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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/720,656

11/24/2003

George Frey

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SEYFARTH SHAW LLP
131 S. DEARBORN ST., SUITE 2400
CHICAGO, IL 60603-5803

EXAMINER

SCHILLINGER, ANN M

ART UNIT

PAPER NUMBER

3774

MAIL DATE

DELIVERY MODE

02/20/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/720,656	Applicant(s) FREY ET AL.	
	Examiner ANN SCHILLINGER	Art Unit 3774	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 November 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-45,47,48 and 57-64 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-45,47,48 and 57-64 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In line 11, the added claim language “each including” makes it unclear if the clamping devices or the foot is intended to hold the receptacle.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 7, 15, and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Liu et al. (US Pat. No. 6,083,154). Liu et al. discloses the following of claim 1: a surgical instrumentation system to provide a surgical approach to a patient's spine, comprising: a frame (8) including a first portion (left side) lying in a first plane and a second portion (right side) lying in a second plane, said second plane forming an angle with said first plane; and a number of retractors (2b) attached to the frame, at least one of said retractors being attached to said first portion of said frame and extending transversely to said first plane and at least one other of said retractors being attached to said second portion of said frame and extending transversely to said second plane (see Figure 1), wherein said first and second portions of said frame each include a recess (8a) to receive clamping devices (7, 12, 22) coupled to respective ones of said retractors, said clamping devices each including a foot (21) with a pair of arms (22a, 22b) located on

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opposite sides of said frame and each including a receptacle defined between said pair of arms for receiving said frame between said pair of arms (see Figure 1) with said clamping devices being slidable from said respective recess along a respective one of said first and second portions of said frame for attachment to said respective portion of said frame at a selected portion of said frame at a selected position therealong spaced from said recess (col. 4, line 55 through col. 5, line 37).

Liu et al. discloses the limitations of claim 2 where the undercut portion of the frame is the outward facing side and the outward facing arm has element 23 to prevent pivoting.

Liu et al. discloses the limitations of claims 3, 4, 15, and 16 as shown in Figure 1.

Liu et al. discloses the limitations of claim 7 as shown in Figure 7.

Claims 17-21, 26-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Koros et al. (US Pat. No. 5,944,658). Koros et al. discloses the following of claim 17: a surgical instrumentation system to provide a surgical approach to a patient's spine, comprising: first and second anchors (54, 56) engageable to first and second vertebrae of the spine; a frame (10, 12) lying in at least one plane; a retractor (20, 18) attachable to said frame, said retractor including a blade portion (26, 28) extending transversely to said at least one plane, said blade portion including a tissue contacting surface (lower surfaces) adapted to contact and retract tissue from the surgical approach; a first distractor mechanism attachable to said frame and extending transversely to said at least one plane, said first distractor mechanism (50) including a distal end engageable to said first anchor (see Figure 1) with said first distractor mechanism in pivotal relation to the first vertebra when said first anchor is engaged with the first vertebra (col. 5, line

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53 through col. 6, line 7); and a second distractor mechanism (52) attachable to said frame and extending transversely to said at least one plane, said second distractor mechanism including a distal end engageable to said second anchor (see Figure 1) and further comprising at least one adjustment mechanism (48) engagable with at least of said first and second distractor mechanisms, wherein said at least one adjustment mechanism includes a shaft having a distal end pivotally coupled with said at least one of said first and second distractor mechanisms at a pivoting coupling location adjacent a proximal end of said at least one distractor mechanisms, said shaft extending away from said pivoting coupling location toward said frame and into clamping device movable along said frame and operable to clampingly engage said adjustment mechanism to said frame (see Figure 1).

Koros et al. discloses the limitations of claims 18-21 where the anchors are screws 54 and 56; and the yokes (58, 60) and socket portions can be seen in Figure 1.

Koros et al. discloses the following of claim 26: a system of claim 22, wherein said adjustment mechanisms each include: an adjustment handle; a shaft assembly extending from said adjustment handle (see Figure 1); and an engagement member (36) at an end of said shaft assembly opposite said adjustment handle.

Koros et al. discloses the limitations of claims 27-40 as shown in Figure 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Liu et al. in view of Koros et al. (US Pat. No. 5,944,658). Liu et al. discloses the invention substantially as claimed, however, Liu et al. does not disclose the claimed distractor mechanisms and their features. Koros et al. teaches a spinal instrumentation system with these distractor mechanisms in columns 4 and 5 for the purpose of manipulating the vertebrae. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include distractor mechanisms in order to manipulate the vertebrae.

Claims 22-25, 41-48, and 57-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koros et al. in view of Liu et al. (US Pat. No. 6,083,154). Koros et al. discloses the invention substantially as claimed, however, Koros et al. does not disclose multiple adjustment members for each of the retractor and distractor mechanisms. Liu et al. teaches a spinal instrumentation system which has these adjustment members in col. 3, lines 7-40, and col. 4, line 55 through col. 5, line 37 for the purpose of placing the devices the desired position. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include these adjustment members in order to place the devices the desired position.

Response to Arguments

Applicant's arguments filed 11/23/2007 have been fully considered but they are not persuasive. The planes of claim 1 may be arbitrary planes selected from space, and for the Lui reference one plane may be vertical and the other may be horizontal so that they will intersect at an angle. The recess described in claim 1 referred to the "first and second portions of said frame each include a recess" which was defined in the previous Office Action on page 2 as element 8a. In the Koros et al. reference, the shaft was interpreted to be the body below element 48 that

includes a pivot pin and engages element 52. It will move element 52 along the rack gear shown in Figure 1. For claims 57 and 58, Koros et al. was modified by Lui to include Lui's adjustment mechanism (7) that locks and releases the distractors. It has an adjustment handle at element 23 and a bearing screw threaded portion which acts as the interlocking teeth.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANN SCHILLINGER whose telephone number is (571)272-6652. The examiner can normally be reached on Mon. thru Fri. 9 a.m. to 4 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on (571) 272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Ann Schillinger
February 14, 2008

/Corrine M McDermott/
Supervisory Patent Examiner, Art Unit 3738